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Supreme Court of the United States

October Term, 1966

No. 358

CHRISTOS VASSOS,

Petitioner,

against

CLAIRE ORNSTEIN, as Executrix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

BRIEF OF RESPONDENT, SAROT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement

Respondent, Irving Sarot, submits this brief in opposition to the application of Christos Vassos, the above-named petitioner, for a writ of certiorari to the Court of Appeals of the State of New York.

Jurisdiction of the Court

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U. S. C. Section 1257(3). Respondent, Sarot, contends that no question is presented sufficient for this Court to take jurisdiction under the aforesaid statute relied on herein by the petitioner.

The Question Presented Upon This Application for a Writ of Certiorari

The petitioner contends that he was deprived of his alleged right to a jury trial in a civil suit in the New York Courts when the Trial Judge directed a judgment dismissing his complaint instead of submitting his case to the jury. The respondent, Sarot, contends that no constitutional question is presented and that, in any event, the Trial Judge was right in ruling that petitioner's case against the respondent, Sarot, was barred as a matter of law under the local statute of limitations.

Numerals in parentheses preceded by the letter "R" indicate pages of the joint Respondents' Appendix in the State appellate courts.

Statement of Facts

This petitioner claimed that he was injured in May, 1949, when he was a seaman aboard the S.S. Canopus. He first brought an unsuccessful action in the Federal Court against the ship owners (RA 88, 163). He commenced the present action in the Supreme Court, New York County, on September 1st, 1960.

The defendants in this action are three of the doctors who treated him for the injury he allegedly sustained aboard ship.

George G. Ornstein, who was originally a defendant in this action, died during the pendency of the suit and his executrix was substituted as a party defendant.

It appears that petitioner's employer, Mar Trade Corporation, sent him to Dr. Christ Bozes for treatment. Dr. Bozes, a general practitioner, had petitioner admitted for observation to the Medical Arts Hospital on West 57th Street, Manhattan, made a tentative diagnosis of tuberculosis but the doctor who had taken X-rays of the petitioner

for Dr. Bozes though that the petitioner was suffering from a diaphragmatic hernia. Sputum tests taken of him had been negative. His condition was difficult to diagnose (RA 9, 11, 12, 13, 17). Dr. Bozes referred the petitioner to the defendant Dr. Ornstein. The medical finding at this time was, "Definite diagnosis has not been established" (RA 39).

Dr. Ornstein, who was a specialist in diseases of the chest but not a surgeon, made a diagnosis of diaphragmatic hernia, a condition requiring surgery (RA 9, 10, 11). Thereupon, the petitioner was referred to the respondent, Dr. Irving A. Sarot, whose specialty was thoracic surgery (RA 123, 132). Dr. Sarot operated on the petitioner at Mt. Sinai Hospital on January 30th, 1950. Exposure of the chest cavity revealed that the petitioner was suffering not from a diaphragmatic hernia but from pulmonary tuberculosis. Dr. Sarot accordingly removed the infected lower lobe of plaintiff's left lung (RA 132, 138, 139).

The night before the operation Dr. Sarot visited the petitioner at the hospital and explained to him, through an interpreter (petitioner spoke only Greek at the time), the nature of the operation. This fact was brought out by the testimony of Dr. Sarot when he testified at the trial as petitioner's witness.

A portion of Dr. Sarot's testimony is as follows (RA 129-130):

> "Q. Did you tell him he was going to be operated on for a diaphragmatic hernia? A. No.
>
> Q. What did you tell him he was going to be operated on for? A. I told him that the diagnosis could not be differentiated from a diaphragmatic hernia, of a traumatic type, or an inflammatory lesion in the left lower lobe, but since the surgical approach was the same and since in 1949 there was no treatment which was adequate for tension cavities of the lower lobe, or any lower lobe, since we had no antimicrobials, as unfortunately I heard Dr. Simmons say yesterday in this court—there was no

antimicrobials yet discovered in 1949 or '50, and since there was nothing but the, how shall I say it? The unpredictable results of prolonged bed rest in that type of case, that of an inflammatory condition in the lung which could not have been proven yet to be tuberculosis but repeated tests had been negative for sputum and others, that the operation would reveal whether there was a diaphragmatic hernia, or whether there was a localized chronic lesion in the left lower lobe, and since the approach was exactly the same surgically, the condition could be recognized and corrected at the time of operation.

Q. How long did it take you to tell all that to Mr. Vassos? A. It took me two to three hours on the night before the operation, having just come from a consultation with Dr. Ornstein on this very thing. * * *

* * * I tried my best to give him the explicit facts as clearly as I could put them through the interpreter who didn't speak English much better.

Q. That wasn't my question. My question was whether, in answer to my previous question, you had stated that you had conveyed a great deal of information speaking about the absence of certain drugs which were not available at that time, in the nature of an exploratory surgical intervention, did you tell all that to him through the interpreter? A. I did not tell him about the fact that drugs would be discovered in ten years. But I said we had no medicine then or treatments then other than surgical incision which could hope to cure a chronic inflammation of the lung or a diaphragmatic hernia in the same area.

Q. Did you tell him all that, Doctor? A. Absolutely, sir. I can remember that particularly.

Q. Very well. Now, did you tell him that there was some lung involvement in the nature of tuberculosis? A. I didn't know it was tuberculosis. I said there was some lung involvement."

After the operation, Dr. Sarot explained to petitioner's interpreter precisely what had been done and noted this fact on the chart (RA 143).

Petitioner was discharged from Mt. Sinai Hospital after his operation because Mar Trade Corporation refused to pay for his expenses there while he was simply awaiting removal to a T. B. sanitarium (RA 133).

Dr. Sarot obtained petitioner's admission at a reduced rate to the House of Rest in Yonkers, New York; the House of Rest was an sanitarium for the treatment of advanced cases of tuberculosis (RA 136, 143).

Upon petitioner's discharge from Mt. Sinai Hospital and his admission to the House of Rest, he ceased to be Dr. Sarot's patient and Dr. Sarot's responsibility for his further care and treatment came to an end (RA 135).

Before the operation by Dr. Sarot, the petitioner executed a written consent on a printed form supplied by the hospital. The consent, however, was missing from the file at the time of the trial (RA 145, 146).

Petitioner underwent further surgery at the hands of another doctor who removed the petitioner's entire left lung. Eventually, it appears, the petitioner made a good recovery and at the time of the trial appeared to be strong and healthy (RA 81, 249).

After his lawsuit in the Federal Court against the owners of the S.S. Canopus turned out unsuccessfully, the petitioner brought this present action against Dr. Bozes, Dr. Ornstein and Dr. Sarot in the Supreme Court, New York. At the trial of this action, it was stipulated that the action was not commenced prior to August, 1960 (RA 240).

The original complaint, verified by the petitioner on August 22nd, 1960, contains a single cause of action.

The essence of the petitioner's grievance is that, whereas the first diagnosis of his condition was diaphragmatic hernia, the operation revealed that he was actually suffering from tuberculosis. On that basis, his original complaint specifically charged the defendants with mal-prac-

tice. However, the single cause of action in the original complaint also charged that the defendants concealed from the petitioner his true condition (RA 258-259). Accordingly, when the defendant, Ornstein, moved to dismiss the complaint as being barred by the two year statute of limitations applicable to malpractice actions, Mr. Justice Nathan denied the motion, saying, in part (A-30-A-31):

> "In addition, plaintiff alleges fraud in that defendants misrepresented what they did in performance of the contract and withheld information of what they did without plaintiff's consent. This additional charge of fraud affects the time when the statute begins to run, which, for the purpose of this motion, is controlled by the allegation of when the fraud was discovered. The motion is denied, with leave to defendant to plead the defense in his answer."

Thereafter, when the respondent, Sarot moved for summary judgment upon the ground that petitioner's cause of action was barred by the two year statute of limitations applicable to malpractice action (A-9), Mr. Justice Marks denied Sarot's motion (and also a similar motion by the defendant, Bozes) stating (A-29):

> "The reasons stated in the opinion of Mr. Justice Nathan on the motions of the third defendant herein are equally applicable to these motions"

Subsequently, the petitioner served an amended complaint verified on September 24, 1963; this amended complaint was printed at pages 261-269 of the respondents joint appendix in the Appellate Division.

The first cause of action in the amended complaint charges all three defendants with malpractice (RA 261-265).

The second cause of action is directed solely against the defendant, Ornstein, and charges him with malpractice (RA 265-266).

The third cause of action is directed solely against the respondent, Sarot, and charges him with malpractice (RA 266-267).

The fourth cause of action is directed against all three defendants and attempts to charge them with fraud (RA 267-268); the basis of the claim of a charge of fraud is that the defendants allegedly concealed from the petitioner the fact that he had tuberculosis.

The fifth cause of action is directed against all defendants and alleges in substance that the acts charged against them in the prior paragraphs of the complaint constitute a breach of contract (RA 268-269).

The case went to trial on the amended complaint and the answers to the amended complaint interposed by the defendants. At the trial petitioner testified that, before his operation, Dr. Sarot told him that he had a diaphragmatic hernia which required repair and that, after the operation, Dr. Sarot told him that the diaphragmatic hernia had been repaired and that, in addition, it was necessary to remove the lower lobe of his left lung because it had been damaged by the accident on the ship. He contended that at no time did Dr. Sarot inform him that he had tuberculosis (RA 78, 79). It was petitioner's contention that he did not know that he had tuberculosis until 1960, the year when he commenced the present lawsuit (RA 79, 83).

But on cross-examination, petitioner was confronted with two letters he had written while at the House of Rest in Yonkers.

In the first of the letters, dated October 13th, 1951, (introduced into evidence as defendants' exhibit H, RA 250-251), addressed to petitioner's employer, Mar Trade Corporation, petitioner stated that he had a lobectomy performed on his left lung by Dr. Sarot at Mount Sinai Hospital and that "the bronchial tube where the lobectomy had been performed had become infected."

In the second letter addressed to Dr. Ornstein and dated May 8th, 1961, written from the House of Rest, petitioner stated that he was aware that he had tuberculosis; his complaint was that his condition had originally been diagnosed as a diaphragmatic hernia. That letter introduced in evidence as defendants' Exhibit I, states, in part, as follows (RA 252-253):

> * * * "After the operation I was informed that the lower lobe of my left lung had been removed because of tuberculosis pathology. In May 1950 I was sent to the House of Rest at Sprain Ridge where I am still curing for tuberculosis." * * *
>
> * * * "First of all, I wish to know whether I had a lobectomy in addition to the operation for the hernia, or whether the lobectomy was the only surgery performed by Dr. Sarot.
>
> Secondly, in view of the fact that ten doctors all agreed on a diagnosis of diaphragmatic hernia, and had made several tests for pulmonary diseases including tuberculosis tests and a total of seventy-five X-rays, how is it that tuberculosis was not diagnosed at the time? As I did not have a positive sputum (for TB) until after I entered the House of Rest, and then developed an infected stitch in a bronchus that is still keeping my sputum positive, I wonder if something happened during the operation that would have caused this infection." * * *.

In reply to the petitioner's letter of May 8th, 1951, addressed to Dr. Ornstein, Dr. Lawrence Lercher, Dr. Ornstein's associate, addressed to petitioner a letter dated May 22nd, 1951 (admitted into evidence as defendants' Exhibit J). That letter reads, in part, as follows (RA 254):

> "Regarding the information that you requested in your letter of May 8, 1951, the first question you wanted answered was whether you had a lobectomy in addition to the operation for the hernia. The answer to this is that you did have a lobectomy of the left lower lobe and on the operating table a mass was found in this area which, apparently, on clinical

observation before this operation was thought to be a hernia and was found to be a tuberculous infection.

Regarding your second question, although the diagnosis was made of diaphragmatic hernia by very many doctors and tuberculosis was not diagnosed, it is sometimes not very easy to make this diagnosis as they very often look very much alike, and it is only by exploratory operations that the diagnosis is made. In either case, whether it was a hernia or the disease that was found, the same operation would have been performed because it was indicated for either conditions. The fact that you never had a positive sputum before does not mean too much as very often there are people with certain types of pulmonary tuberculosis who do not have positive sputums on examination." * * *

Of course, these letters destroyed petitioner's contention that he did not have any knowledge of his tubercular condition until shortly before the commencement of the present lawsuit.

When he was first confronted with this correspondence, petitioner denied that he had signed the letter dated May 8th, 1951 (defendants' Exhibit I). Subsequently, on further examination he admitted that the signature on the letter was his (RA 111, 113).

The next day, counsel for petitioner produced a handwriting expert, J. Howard Haring, who testified that the signature "Christos Vassos" on defendants' Exhibit I was not written by the plaintiff (RA 211).

It was on this basis that the petitioner contended that an issue of fact existed as to whether he had knowledge of his tubercular condition back in 1950, ten years before the present action was commenced. If, however, he had knowledge back in 1950 of his tubercular condition and of the nature of the operation performed by Dr. Sarot, then, of course, his present action, whether based on contract or fraud, is barred.

Now, defendants' Exhibit J, the letter dated May 22nd, 1951, and written by Dr. Lercher, Dr. Ornstein's associate, in reply to defendants' Exhibit I, was admitted in evidence without objection by counsel for petitioner under a stipulation, exacted by counsel for petitioner, that there would be no further cross-examination of the petitioner. In this connection, the record shows the following (RA 117):

> "Mr. Rassner (counsel for petitioner): If the Court please, in the interest of saving time, I make this proposition to counsel for both defendants. I will withdraw my objection to the copy of the letter purportedly written by Dr. Ornstein (sic. Lercher) to Mr. Vassos, if they will both say that's as far as they go with cross-examination. If I get that concession from both, I will withdraw my objection.
>
> Mr. Walsh: The letter is in response to a letter written by the plaintiff to Dr. Ornstein on May 8th and this is a copy of the original letter sent to him.
>
> Mr. Rassner: That's the one I am talking about. If you will stop your cross-examination, I will consent to the letter going in.
>
> Mr. Fager: I have no objection.
>
> The Court: Let it be marked.
>
> (Letter of May 22, 1951, received in evidence and marked Defendants' Exhibit J.)."

It was upon this state of facts that the Trial Court, after both sides had rested, granted defendants' motions to dismiss the complaint pursuant to Rule 4401 of the Civil Practice Law and Rules.

The Trial Court's Decision

In its oral decision dismissing the complaint, the Trial Court said, in part (RA 246-247, 248):

> "I am ignoring the testimony given by Mr. Haring. I am saying it is of no consequence whether it goes one way or another. Mr. Haring's opinion has been rendered. Of course, Mr. Haring's opinion

doesn't take account of the fact that, in addition to the standards considered by him, there are four other specimens of handwriting, four other specimens of signature by this plaintiff, which correspond in certain details, to the disputed signatures. The details not corresponding to the other standards considered by Mr. Haring. There is really nothing conclusive about the opinion that he has rendered. But even assuming that I were to disregard utterly and completely Defendants' Exhibit I, I cannot, in the face of the concession which has been made here—and this is without making a ruling upon credibility of someone who didn't even appear here as a witness—that is this Dr. Lercher—I can't, unless I am going to disregard that concession completely, find other than that the letter which is Defendants' Exhibit J, ostensibly in reply to the letter which is Defendants' Exhibit I, was actually sent to this plaintiff in May, 1951, and this is despite of his denial of ever having received such a letter.

I know that the concession was made without conceding the truth of the testimony which it is conceded would be given by Dr. Lercher. But if this concession is to have any meaning at all, and in the absence of anything that would affect the credibility of the person as to whom the concession is made, except the plaintiff's bare statement that he never got such a letter, I would be remiss in my duty if I found other than, or allowed anybody else to find other than that, that letter, Exhibit J, was sent and Exhibit J is written in clear and unequivocal terms advising the plaintiff and informing him back in May 1951, of the nature of the operation that he underwent.

So that he knew or should have known, in May, 1961, that he had a lobectomy of tubercular tissue and that this was the procedure that he underwent at that time. He was placed on inquiry at the very least by the receipt of that letter." * * *

The Trial Justice added the following observation to his oral decision (RA 249):

* * * "I say this: That if it weren't for the testimony of Mr. Haring, I wouldn't hesitate to sit as a

Magistrate and commit this man (*i.e.* the plaintiff) for perjury with respect to that letter, Exhibit I, and, Mr. Rassner, I want it to be distinctly understood that I know as a fact that you knew nothing about this letter, Exhibit I, and that it came to you in this trial like a blow in the face, and you are, of course, not to be held accountable in any way for what your client has done." * * *

Further Proceedings in the State Courts

The petitioner appealed to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of the Trial Court dismissing his complaint. By an order dated November 30, 1965, the Appellate Division unanimously affirmed the judgment of the Trial Court and thereafter denied petitioner's application for leave to appeal to the Court of Appeals. Subsequently petitioner made a motion in the Court of Appeals for permission to appeal to that Court, but his application was denied by an order of the Court of Appeals dated March 24, 1966.

POINT I

The petition for certiorari presents no question for review under the constitution or statutes or laws of the United States.

The petitioner invokes the jurisdiction of this Court under 28 U. S. C. Section 1257(3), the pertinent language of which provides that a final judgment or decree rendered by the highest Court of the State may be reviewed by the United States Supreme Court upon writ of certiorari where any title, right, privilege or immunity is specially set up or claimed under the Constitution, Treaties or Statutes of the United States. The petitioner's complaint is that the Trial Court dismissed his complaint as a matter of law instead of submitting the case to the jury. But it is

settled beyond question that such a direction by the State Court presents no question of deprivation of rights under the Constitution or Statutes of the United States because the Seventh Amendment guaranteeing the right to trial by jury does not apply to jury trials in civil proceedings in State Courts.

Minneapolis & St. Louis Railway Co. v. *Bombolis*, 241 U. S. 211, 217 (1916);
Southern Railway Co. v. *City of Durham*, 266 U. S. 178, 179 (1924);
Gustafson v. *Peck*, 216 F. S. 370, 371 (D. C. N. D. Iowa, 1963) and authorities cited therein.

In *Southern Railway Co.* v. *City of Durham*, *supra*, this Court said, in part (p. 179 of 266 U. S.):

> • • • "We are unable to find that plaintiffs in error have been deprived of any Federal right. They had full opportunity to present evidence to support their contentions in the trial court, but offered none. Neither Federal laws or Constitution give them the right to demand trial by jury when the local statutes and practice prescribed otherwise. The ordinary rule applies and we accept the ruling of the supreme court (of North Carolina) as to the local law. First Nat. Bank v. Weld County, 264 U. S. 450."

It is submitted that the above-quoted language is the firmly established law and, for that reason, the petitioner has no basis for invoking the jurisdiction of this Court.

POINT II

The record herein presented no disputed issue of fact to be submitted to the jury; consequently, judgment was properly granted in favor of the respondent, Sarot, pursuant to the Civil Practice Law and Rules of the State of New York.

The Civil Practice Law and Rules of the State of New York substitutes an omnibus motion in place of the several motions during trial that were available under the Civil Practice Act. Rule 4401 of the CPLR now provides as follows:

> "Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties."

The authority for granting judgment in the cases covered by the new rule was well marked out by the case law under the Civil Practice Act. The practice commentary in the McKinney's edition of the consolidated laws states, with respect to Rule 4401, that:

> "No test is set up by the statute in regard to when the motion should be granted or denied except that the motion must be made on the ground that the moving party is entitled to judgment as a matter of law. The case law as it existed prior to the CPLR will therefore provide the tests for determining whether the moving party is entitled to judgment as a matter of law."

The leading case laying down the guidelines as to the situations in which the Court may grant judgment for one

party or the other, in a case triable as of right by jury, is *Blum* v. *Fresh Grown Preserve Corp.*, 292 N. Y. 241 (1944). There the Court of Appeals, affirming a judgment directed in the plaintiffs' favor by the Courts below, said in part (pages 245-246 of 292 N. Y.):

> "The courts below have not mistaken their power. They have found that by no rational process could the trier of the facts base a finding in favor of the defendant upon the evidence here presented. This court has frequently pointed out that 'insufficient evidence is, in the eye of the law, no evidence.' In Matter of Case (supra, p. 204), opinion by Cardozo, J., it reiterated that rule and added: 'In the words of Maule, J., in Jewell v. Parr (13 C. B. 916), 'When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established.'"
>
> The sufficiency of evidence 'reasonably to satisfy a jury' cannot be mechanically measured. It is 'incredible as matter of law' only where no reasonable man could accept it and base an inference upon it. That depends upon considerations which vary in accordance with the circumstances of the particular case. It would serve no purpose here to analyze the evidence produced by the defendant. When considered in its setting of facts which are undisputed it lacks, we conclude, the substance which is required reasonably to support the finding of the jury."

As the Court of Appeals pointed out in the *Blum* case, *supra*, no constitutional right of a party is violated when the Court directs judgment against him because he has presented insufficient evidence to take his case to the jury.

On the contrary, the common law right of trial by jury both in England and in the United States has traditionally been subject to the requirement that the evidence in the particular case present a genuine issue of fact; where the evidence is insufficient to create an issue of fact for the jury, the power of the Courts to direct the verdict for the

party entitled to judgment has never seriously been in doubt.

Pollack v. *Pollack*, 71 N. Y. 137, 153 (1877);
Matter of Case, 214 N. Y. 199, 203, 204 (1915).

In the present case, the petitioner's brief altogether ignores the ground upon which the Trial Court directed judgment against him; his brief challenges in no respect the grounds upon which the Trial Court found that, back in 1951, at the latest, he was fully informed of his tubercular condition and of the nature of the operation performed by Dr. Sarot.

As a matter of fact, the Trial Court's decision dismissing the complaint is unanswerable. Petitioner's knowledge back in 1950 that he had tuberculosis is established beyond all doubt by the record herein. Dr. Sarot, whom petitioner called as his own witness, testified that he had fully informed petitioner of the latter's condition. Soon after the operation petitioner was a patient for six months at the House of Rest, a sanitarium for advanced tuberculosis cases. While he was there, the exchange of correspondence occurred which was put in evidence at the trial.

In this state of the record, the Trial Justice had no alternative except to grant the motion to dismiss the petitioner's complaint.

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

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THOMAS GRIMES,
THOMAS J. WALSH,
On the Brief.